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Kevin Miller

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ORACLE C/O MURABITO, HAO & BARNES LLP
TWO NORTH MARKET STREET
THIRD FLOOR
SAN JOSE, CA 95113

EXAMINER

BORLINGHAUS, JASON M

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 09/924,671	Applicant(s) MILLER ET AL.	
	Examiner JASON M. BORLINGHAUS	Art Unit 3693	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 28 August 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-18 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-18 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 103

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1 – 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Alaia et al (US Patent No. 6,199,050).

Regarding Claim 1, Alaia discloses in an electronic commerce exchange, an auction method, system and apparatus for implementing automatic extension of an auction in response to bidding activity from auction participants, comprising the steps of: setting an end time for concluding an auction. (see col. 4, lines 12-40);

- receiving bids from remote bidders via a distributed computing network.
(see col. 4, lines 12-65);

- measuring a number of bids received within a predetermined time of the auction end time. (see col. 4, lines 12–65);
- if the measured number of bids exceeds a threshold number of bids, extending the duration of the auction automatically and setting a new auction end time (see col. 4 -8, 14); and
- notifying auction participants of the new auction end time (see col. 4, line 61 - col. 5, line 46; col. 6, lines 30 - 67; col. 7, lines 1-31).

Alaia does not explicitly disclose wherein said threshold number of bids is at least one bid, although Alaia does disclose that one "aspect of flexible overtime is variable overtime triggers" which implies that the overtime trigger could be set at a variety of settings. (see col. 13, lines 53 – 66).

Additionally, Alaia, while discussing reverse auctions, discloses that "[o]vertime was triggered if the price of a new bid submitted within the appropriate interval was lower than the current best bid." (see col. 13, lines 53 - 66). Examiner asserts that Alaia at least suggests that the threshold number of bids is at least one bid.

If only one bid is submitted the auction will close as originally stated. The submission of only one bid for an auction demonstrates little interest in the auction and closure of the auction would seem to be proper. However, if a second bid is submitted, especially a second bid that is superior to the first bid, then the auction should be extended. The submission of a second bid indicates interest in the auction and the auction should be extended to allow the first bidder a chance to response.

Examiner asserts that it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Alaia to allow for any threshold number of bids that the inventor desired. *In re Kuhle*, 526 F.2d 553, 555, 188 USPQ 7, 9 (CCPA 1975).

Regarding Claims 2 - 6, Alaia discloses an auction method further comprising:

- a step of setting a start time of the auction (see col. 4, lines 12-40);
- the threshold number of bids is user defined (see col. 4, lines 23-40; col. 6, lines 63-67; col. 7, lines 1-30; col. 14, lines 23-59);
- the predetermined time is user defined (see col. 4, lines 23-40; col. 6, lines 63-67; col. 7, lines 1-30; col. 9, line 25+; col. 14, lines 23-59);
- the duration of the extension from the new auction end time is user defined. (see col. 4, lines 23-40; col. 6, lines 63-67; col. 7, lines 1-30; col. 14, lines 23-59); and
- the step of extending the duration of the auction a plurality of times where the greater number of bids is received within the predetermined time respectively (see col. 4, lines 23-40; col. 6, lines 63-67; col. 7, lines 1-30; col. 14, lines 23-59).

Claims 7 – 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Alaia, as applied to Claim 1 above, and further in view of eBay Help Basics, Frequently Asked Questions on Bidding (hereinafter, eBay).

Regarding Claim 7, Alaia does not disclose a method including a step of setting a minimum bid difference at which a succeeding bid must differ from a preceding bid from the remote bidders.

Ebay discloses a method of setting a minimum bid difference at which a succeeding bid must differ from a preceding bid from the remote bidders, as is well known in auction practice, called bid increments (see pp. 1-4, especially 2).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the auction method of Alaia to include the bid incrementation of Ebay because such incorporation would have made the auction more user-friendly and efficient.

Regarding Claim 8, Alaia discloses in an electronic commerce exchange, an auction method for implementing dynamic automatic extension of an auction in response to bidding activity from auction participants, comprising the steps of:

- setting a start time and an end time for an auction. (see col. 4, lines 12-40);
- receiving bids from remote bidders via a distributed computing network. (see col. 4, lines 12-65);
- measuring a number of bids received within a predetermined time of the auction end time. (see col. 4, lines 12 – 65);
- if the measured number of bids exceeds the threshold number of bids, extending the duration of the auction automatically and setting a new auction end time. (see col. 4 -8, 14); and

- notifying auction participants of the new end time (see col. 4, lines 23-40; col. 6, lines 63-67; col. 7, lines 1-30; col. 9, lines 3-41; col. 14, lines 23-59; and as detailed above).

Alaia does not explicitly disclose wherein said threshold number of bids is at least one bid, although Alaia does disclose that one "aspect of flexible overtime is variable overtime triggers" which implies that the overtime trigger could be set at a variety of settings. (see col. 13, lines 53 – 66).

Additionally, Alaia, while discussing reverse auctions, discloses that "[o]vertime was triggered if the price of a new bid submitted within the appropriate interval was lower than the current best bid." (see col. 13, lines 53 - 66). Examiner asserts that Alaia at least suggests that the threshold number of bids is at least one bid.

If only one bid is submitted the auction will close as originally stated. The submission of only one bid for an auction demonstrates little interest in the auction and closure of the auction would seem to be proper. However, if a second bid is submitted, especially a second bid that is superior to the first bid, then the auction should be extended. The submission of a second bid indicates interest in the auction and the auction should be extended to allow the first bidder a chance to response.

Examiner asserts that it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Alaia to allow for any threshold number of bids that the inventor desired. *In re Kuhle*, 526 F.2d 553, 555, 188 USPQ 7, 9 (CCPA 1975).

Alaia does not disclose a method including a step of setting a minimum bid difference at which a succeeding bid must differ from a preceding bid from the remote bidders.

Ebay discloses a method of setting a minimum bid difference at which a succeeding bid must differ from a preceding bid from the remote bidders, as is well known in auction practice, called bid increments (see pp. 1-4, especially 2).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the auction method of Alaia to include the bid incrementation of Ebay because such incorporation would have made the auction more user-friendly and efficient.

Regarding Claim 9, 13 and 14, Alaia does not explicitly state that the threshold number of bids is altered dynamically after the start time of the auction or during said auction, although Alaia does disclose that “[d]ecision rules can be set dynamically during the course of the bidding event by the bidder.” (see col. 9, lines 61 – 65).

Additionally, Alaia discloses that the "auction may be paused by the auction coordinator to correct technical, market and miscellaneous problems that may arise during the course of an auction.” (see abstract).

Examiner asserts that it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Alaia and Ebay to allow for a user to pause and alter system parameters after the start time of the auction, as suggested by Alaia, allowing for corrections that may be required during the course of an auction.

Regarding Claims 10 - 12, Alaia discloses the auction method wherein:

- the predetermined time is altered dynamically after the start time of the auction (col. 9, lines 3-41);
- the duration of the extension from the new auction end time is altered dynamically after the start time of the auction (col. 9, lines 3-41);
- extending the duration of the auction a plurality of times where the greater number of bids are received within the predetermined time respectively (col. 7, lines 19-31; col. 9, lines 3-41).

Claims 15 - 18 are rejected under 35 U.S.C. 102 as being unpatentable in view of Brett (US Patent 6,704,713) in view of Alaia.

Regarding Claim 15, Brett discloses a method for automatically extending an auction comprising the steps of:

- setting an end time for concluding an auction. (see col. 13, lines 1 - 45);
- receiving bids from remote bidders via a distributed computing network. (see col. 13, lines 1 - 45);
- measuring a rate at which incoming bids are received. (see col. 13, lines 1 – 45); and
- if the measured rate of incoming bids exceeds a predetermined threshold, automatically extending the duration of the auction and setting a new auction end time. (see col. 13, lines 1 – 45).

Brett does not teach an auction method comprising notifying auction participants of the new auction end time.

Alaia discloses an auction method comprising notifying auction participants of the new auction end time. (see col. 4, lines 23-40; col. 6, lines 63-67; col. 7, lines 1-30; col. 9, lines 3-41; col. 14, lines 23-59; and as detailed above).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified Brett by incorporating the notification feature of Alaia, thereby allowing potential bidders to be aware of the remaining time in the auction.

Regarding Claims 16 – 18, Brett discloses a method wherein:

- measuring said rate at which incoming bids are received during a predetermined time before the end of said auction. (see col. 13, lines 1 – 45); and
- said threshold is set prior to the start of said auction. (see col. 13, lines 1 – 45).

Brett does not teach a method wherein said threshold is dynamically adjustable during said auction.

While, Alaia does not explicitly state that the threshold number of bids is altered dynamically after the start time of the auction or during said auction, although Alaia does disclose that “[d]ecision rules can be set dynamically during the course of the bidding event by the bidder.” (see col. 9, lines 61 – 65).

Additionally, Alaia discloses that the "auction may be paused by the auction coordinator to correct technical, market and miscellaneous problems that may arise during the course of an auction." (see abstract).

Examiner asserts that it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Brett and Alaia to allow for a user to pause and alter system parameters after the start time of the auction, as suggested by Alaia, allowing for corrections that may be required during the course of an auction.

Response to Arguments

Applicant's arguments filed 8/28/08 have been fully considered but they are not persuasive.

Failure to Disclose Claim Element

Applicant argues that the cited prior art, Alaia, fails to disclose or suggest the the claim limitation of "wherein said threshold number of bids is at least one." Examiner refutes such an assertion.

The pertinent claimed limitation is

if the measured number of bids exceeds a threshold number of bids, extending the duration of the auction automatically and setting a new auction end time, wherein said threshold number of bids is at least one bid; (see Claim 1).

Applicant does not argue that Alaia does not teach a "threshold number of bids" but that the Alaia discloses a "bid threshold of zero bids instead of a bid threshold of at least one bid as claimed." (see Arguments, p. 7).

If Examiner understands the Applicant's contention correctly, Applicant is arguing that Alaia has a bid threshold of zero which activates auction overtime upon the submission of one bid, while the claimed invention has a bid threshold of at least one which activates auction overtime upon the submission of two bids.

First, even if such was a correct interpretation, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified Alaia to set the threshold bid at one rather than zero since there are a finite number of identified, predictable potential solutions (e.g. optimal threshold number of bids) to the recognized need (e.g. activation of auction overtime) and one of ordinary skill in the art at the time the invention was made could have pursued the known potential solutions with a reasonable expectation of success, as the cost and benefits were known.

The entire motivation of Alaia is to extend an auction when bidders attempt to submit a bid during an auction's final moments, thereby circumventing the intended competition among bidders. Specifically, Alaia states:

The second problem is premature closing of bidding on lots. Just as in an in-per auction, bidding activity tends to increase close to the scheduled closing time. Like the "going, going, gone" auction concept, it is possible to achieve a better auction price if the auction is allowed to continue if bids are still being made. **As described above, this concept in implemented through the use of "Overtime," by which the closing time of a specific lot is automatically extended based on the flow of bids into the Auction.** Overtime prevents bidders from hanging back and submitting last minute bids in an attempt to prevent competitive reaction. (emphasis added - see col. 6, line 62 – col. 7, line 5).

However, an auctioneer might feel that a threshold of zero bids is an insufficient threshold, as one bid does not indicate a sufficient surge of interest in the auctioned item to warrant extending the auction. Rather the auctioneer might feel that a higher threshold of one or two bids is required, as receipt of two or three bids would indicate sufficient interest among the bidders to warrant extending the auction.

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Second, Alaia suggests that the threshold number of bids (trigger for additional overtime) can be adjusted by the auctioneer, therefore allowing for setting of different threshold number of bids. Specifically, Alaia states:

The trigger for additional overtime can be flexibly set to include a range of behind-market bidding activity. The type of behind-market activity that would trigger additional overtime includes bids or bidders of a defined rank behind market and bids of a defined absolute or relative (percentage) quantity behind the market. Additional trigger parameters can also be flexibly created to suit particular industrial markets. This ensures that extra overtime is triggered when certain bids upset the market dynamic. (see col. 9, lines 2 – 11).

Third, if Applicant believes that the claimed limitation of a threshold number of bids greater than or equal to one is non-obvious in view of prior art disclosing a threshold number of bids equal to zero, does that mean that a higher threshold number would be non-obvious in view of the Applicant's claimed invention? For example, if I claimed a threshold number of bids of at least two bids is that non-obvious in light of the Applicant's invention?

Applicant argues that prior art Alaia fails to teach or suggest the claim limitation of "wherein said threshold number of bids is dynamically adjustable during said auction," although Applicant does concede that Alaia discloses certain "[d]ecision rules can be set dynamically during the course of the bidding event by the bidder." (see Arguments, p. 11).

Examiner asserts that while Alaia might not explicitly state that the threshold number of bids is dynamically adjustable, Alaia does disclose a threshold number of bids and the value of being able to dynamically adjust decision rules during an auction. Therefore, Examiner asserts that Alaia's two disclosures, in combination, does suggest "wherein said threshold number of bids is dynamically adjustable during said auction."

Applicant argues that prior art Brett fails to teach or suggest "if the measured rate of incoming bids exceeds a predetermined threshold, automatically extending the duration of the auction and setting a new auction end time."

First, Alaia, the primary reference, states:

This Auction employs a decision rule to trigger overtime that can be stated: "when a low bid is submitted during a first time interval t before the scheduled close, reschedule the close to occur later by one time interval t ." Thus, for a time interval t of one minute, a scheduled closing time of 10:30 is extended to 10:31 if overtime is triggered. (see col. 4, line 65 – col. 5, line 4).

Examiner asserts that Alaia discloses a measured rate of incoming bids (i.e. a rate of more than zero bids per time interval) and, if the measured rate exceeds a predetermined threshold (zero), extending the auction.

Second, while Brett does not explicitly state "if the measured rate of incoming bids exceeds a predetermined threshold, automatically extending the duration of the auction and setting a new auction end time," Examiner would asserts that such a claim limitation would have been obvious in view of Brett, itself.

Brett states:

In another alternative embodiment of the invention, a bidding activity meter 302 is used as shown in FIG. 15. The bidding activity meter shows a graphical representation of the rate of bidding on tickets in the venue (e.g., bids per hour). The meter shows a number of different bidding rates from left to right across the meter. A bar extends from the left side of the meter toward the right side of the meter to represent the current bidding rate. In this manner the participant can see the current rate of bids placed for tickets in the venue. The bidding activity meter allows the system to have an adjustable bidding window based upon bidding activity. **The adjustable bidding window may be defined as an adjustable period of time that may be immediately terminated upon the bidding rate reaching a predefined low threshold.** For example, the system may set up an auction for tickets to a particular event starting at 10 a.m. on a particular day. The auction may be set up to accept bids for at least five hours, until 3 p.m., but for no more than fourteen hours, until 12 p.m. Bidding will remain open after 3 p.m., so long as the bidding continues above the predetermined threshold (e.g., 1000 bids per hour). However, if the bidding drops below that threshold, the auction will be closed immediately. Thus, the auction will definitely accept bids from 10 a.m. until 3 p.m. If the total bidding from 3 p.m. to 4 p.m. exceeds the threshold rate, the bidding will remain open. However, if at any time before 12 p.m., the bidding rate drops below the threshold,

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the bidding will immediately cease. Thus, if the threshold is 1000 bids per hour and the total bidding during the hours of 9 p.m. and 10 p.m. drops to 900 bids, the auction will close, and no further bids will be taken. (emphasis added – see col. 13, lines 1 - 30).

Brett discloses shortening the auction if the bid rate should fall below a predetermined threshold. Examiner asserts that the converse would have been obvious based upon the disclosure of Brett - extending an auction if the bid rate exceeds a predetermined threshold - especially when Brett is viewed in conjunction with Alaia.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JASON M. BORLINGHAUS whose telephone number is (571)272-6924. The examiner can normally be reached on 8:30am-5:00pm M-F.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, James Kramer can be reached on (571) 272-6783. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Jason M Borlinghaus/
Examiner, Art Unit 3693

December 1, 2008

/James A. Kramer/
Supervisory Patent Examiner, Art Unit 3693